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4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**

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7 LIFECARE MANAGEMENT SERVICES,  
8 LLC,

9 Plaintiff,

10 vs.

11 ZENITH AMERICAN SOLUTIONS, INC. et  
12 al.,

13 Defendants.

3:15-cv-00307-RCJ-VPC

**ORDER**

14 This case involves a health care provider's claim under the Employee Retirement Income  
15 Security Act ("ERISA") that a trust fund and its third-party administrator improperly refused to  
16 pay benefits under the trust fund's welfare benefit plan. Now pending before the Court is a  
17 Motion for Attorneys' Fees. (Mot. Att'y Fees, ECF No. 133.) For the reasons given herein, the  
18 Court denies the motion.

19 **I. FACTS AND PROCEDURAL BACKGROUND**

20 In October 2011, Jane Doe ("the Patient") was admitted for non-emergency treatment at  
21 Tahoe Pacific Hospital, a facility owned and operated by Plaintiff Lifecare Management  
22 Services, LLC ("Lifecare").<sup>1</sup> Prior to the Patient's admission, Lifecare contacted Defendant  
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1 Unless otherwise indicated, Tahoe Pacific Hospital and Lifecare will be referred to hereinafter collectively as "Lifecare."

1 Zenith American Solutions, Inc. (“Zenith”) to confirm the existence of health care coverage for  
2 the Patient. Zenith was a third-party administrator of the Electrical Workers Health and Welfare  
3 Trust Fund (“the Plan”), a non-profit employee benefit trust fund governed by ERISA and  
4 funded by employer contributions under collective bargaining agreements. Zenith confirmed the  
5 Patient’s coverage, and Lifecare then admitted and treated the Patient. Subsequently, Lifecare  
6 submitted a claim to Zenith in excess of \$700,000, of which Zenith paid roughly \$140,000 and  
7 refused to pay more. With this lawsuit, Lifecare sought the remaining benefits it believed it was  
8 owed under the Plan.

9 On April 13, 2017, the Court granted summary judgment against Lifecare and closed the  
10 case. (Order, ECF No. 131.) The Court held that Lifecare could not pursue an ERISA claim as  
11 the Patient’s assignee because the Patient herself was not eligible for coverage under the  
12 unambiguous terms of the Plan. (*Id.* at 7–10.) Zenith now moves for an award of attorneys’ fees  
13 under 29 U.S.C. § 1132(g)(1). (Mot. Att’y Fees, ECF No. 133.)

## 14 **II. LEGAL STANDARDS**

15 Under 29 U.S.C. § 1132(g), a court in its discretion may award reasonable attorneys’ fees  
16 and costs to either party in an ERISA action brought by a plan participant, beneficiary, or  
17 fiduciary. The Ninth Circuit has held that in exercising this discretion, district courts should  
18 consider the following factors:

19 (1) the degree of the opposing parties’ culpability or bad faith; (2) the ability of  
20 the opposing parties to satisfy an award of fees; (3) whether an award of fees  
21 against the opposing parties would deter others from acting under similar  
22 circumstances; (4) whether the parties requesting fees sought to benefit all  
participants and beneficiaries of an ERISA plan or to resolve a significant legal  
question regarding ERISA; and (5) the relative merits of the parties’ positions.

23 *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980). “No one of the *Hummell*  
24 factors . . . is necessarily decisive, and some may not be pertinent in a given case.” *Carpenters*

1 *Southern California Administrative Corp. v. Russell*, 726 F.2d 1410, 1416 (9th Cir. 1984).

2 Notably, the Ninth Circuit has observed that the *Hummell* factors “very frequently suggest that  
3 attorney’s fees should not be charged against ERISA plaintiffs.” *Tingey v. Pixley–Richards West,*  
4 *Inc.*, 958 F.2d 908, 909 (9th Cir. 1992).

### 5 **III. ANALYSIS**

6 Under clear Ninth Circuit precedent, attorneys’ fees are not available here. *See Corder v.*  
7 *Howard Johnson & Co.*, 53 F.3d 225, 230–31 (9th Cir. 1994) (discussing *Credit Managers Ass’n*  
8 *of Southern California v. Kennesaw Life and Accident Insurance*, 25 F.3d 743 (9th Cir. 1994)).

9 In *Corder*, the Ninth Circuit analyzed the import of its prior ruling in *Credit Managers*. That  
10 analysis need not be fully reproduced here. In brief, the Ninth Circuit affirmed an award of  
11 attorneys’ fees in *Credit Managers*, even though the plaintiff was in fact not an ERISA fiduciary,  
12 because the plaintiff “colorably maintain[ed] for a long time, without any evidentiary basis, ‘that  
13 it was a fiduciary of an ERISA plan throughout the proceedings below, in a manner sufficient to  
14 withstand summary judgment . . . .’” *Id.* at 230 (quoting *Credit Managers*, 25 F.3d at 747). The  
15 court concluded its analysis of *Credit Managers* by stating: “Thus, when a party survives  
16 summary judgment and actually tries its case on the colorable theory that it is one of the  
17 enumerated parties specified in § 1132(g)(1), it may be subjected to an award of fees when it  
18 fails to prevail on that ground because its claim lacks any evidentiary basis.” *Id.* at 230–31.

19 In *Corder*, therefore, the Ninth Circuit found the district court lacked authority to award  
20 attorneys’ fees against the ERISA plan under § 1132(g)(1). *Id.* at 231. In so holding, the court  
21 stated: “Most important, the Plan’s possible status as a fiduciary did not survive summary  
22 judgment, *as Credit Managers requires*; the Plan’s lack of status as a party enumerated in  
23 § 1132(g)(1) was, as we have said, the sole ground of the summary judgment against it on the  
24 ERISA claim.” *Id.* (emphasis added).

1           This case is very closely analogous to *Corder*. Here, Lifecare asserted it was the rightful  
2 assignee of the Patient’s rights under the Plan, and asserted the Patient was eligible for Plan  
3 coverage. However, these assertions did not survive summary judgment. As in *Corder*, the sole  
4 basis for the summary judgment in this case was that the Patient—and by extension Lifecare—  
5 was not a Plan beneficiary or participant. *Corder* establishes that before attorneys’ fees may be  
6 awarded against a plaintiff in an ERISA action, the plaintiff must at least survive summary  
7 judgment on the *possibility* that it is an enumerated party under § 1132(g). Accordingly, the  
8 Court lacks authority to award attorneys’ fees here.

9           Furthermore, the Court briefly notes its satisfaction that the *Hummell* factors also weigh  
10 against awarding attorneys’ fees in this case. At bottom, this dispute arose in large part due to  
11 multiple errors committed by Zenith and the Plan. If Zenith had done its due diligence in  
12 determining whether the Patient was initially eligible for coverage, it would never have enrolled  
13 her in the Plan back in 2003. Thereafter, Zenith confirmed and reconfirmed, on several  
14 occasions, that the Patient was covered. Zenith then went so far as to pay nearly \$140,000 in Plan  
15 benefits based on its incorrect yet persistent belief that the Patient was Plan-eligible. It was not  
16 until summary judgment, more than a year after this case was filed, that Zenith finally asserted  
17 the Patient was ineligible under the plain terms of the Plan. Under these circumstances, the Court  
18 cannot conclude that Lifecare was culpable in bringing this action, or that an award of attorneys’  
19 fees would serve the deterrent purposes of § 1132(g). *See Resilient Floor Covering Pension*  
20 *Trust Fund Bd. of Trustees v. Michael’s Floor Covering, Inc.*, No. 11-cv-05200-JSC, 2017 WL  
21 24747, at \*2 (N.D. Cal. Jan. 3, 2017) (where a plaintiff has a “non-frivolous basis” for asserting  
22 ERISA claims, there is “little to no deterrent effect to awarding fees”).

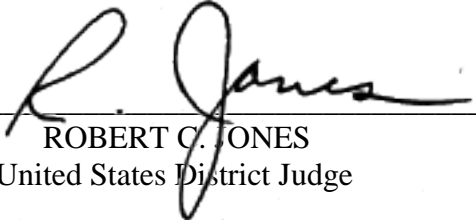
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1 **CONCLUSION**

2 IT IS HEREBY ORDERED that the Motion for Attorneys' Fees (ECF No. 133) is  
3 DENIED.

4 IT IS SO ORDERED. June 14, 2017

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8 ROBERT C. JONES  
9 United States District Judge  
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